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IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1052

REUBIN O'D. ASKEW, et al.,
Appellants,

-vs-

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,
Appellees.

On Appeal from the United States District Court for the Middle District of Florida

BRIEF OF THE STATE OF GEORGIA, AMICUS CURIAE, IN SUPPORT OF THE JURISDICTIONAL STATEMENT OF APPELLANTS

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INDEX

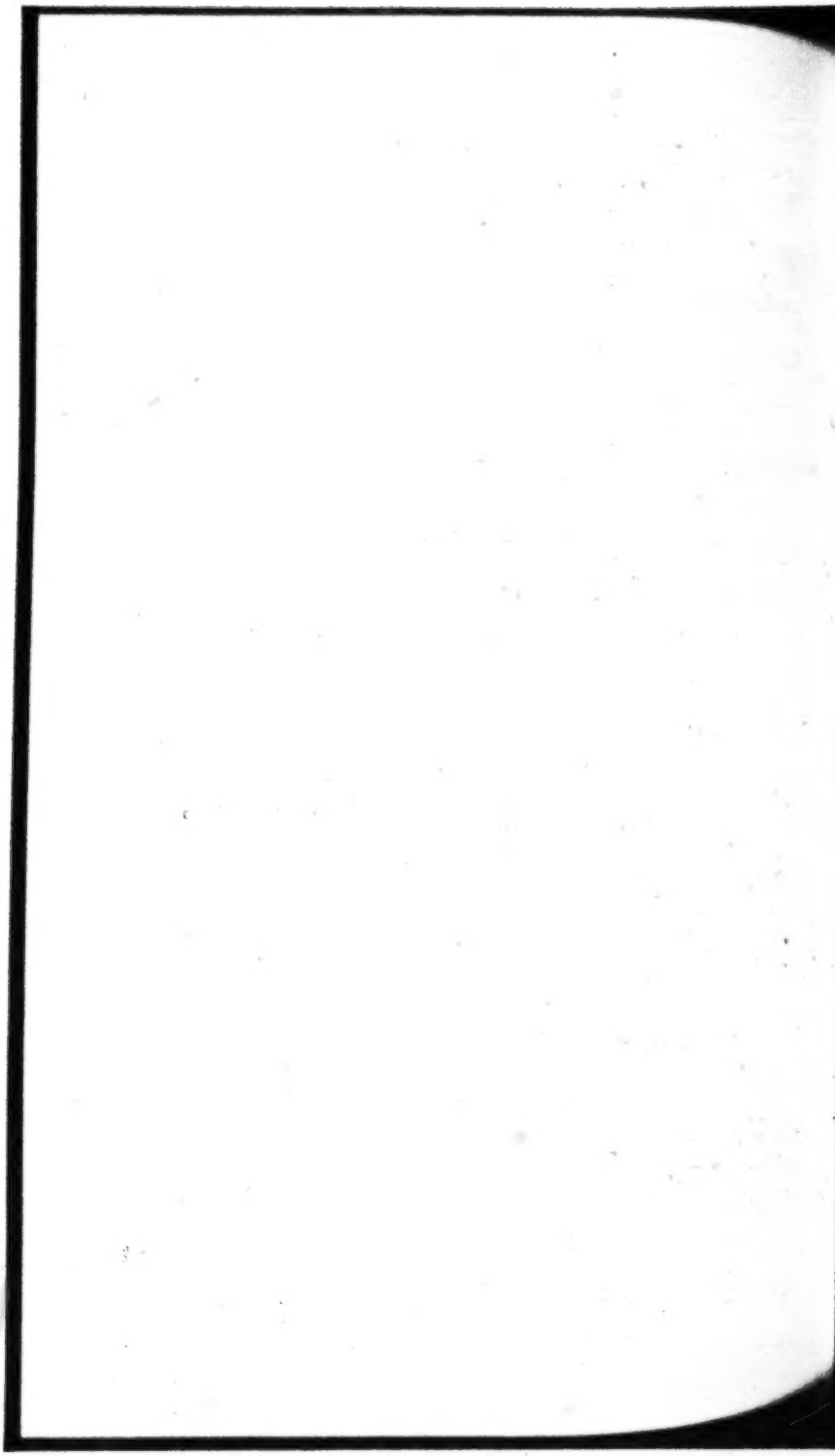
TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued



IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

-vs-

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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BRIEF OF THE STATE OF GEORGIA, AMICUS CURIAE, IN SUPPORT OF THE JURISDICTIONAL STATEMENT OF APPELLANTS

INTEREST OF AMICUS CURIAE

Almost ninety years ago this Court upheld the right of Louisiana to protect its citizens from yellow fever and cholera by subjecting all vessels approaching New Orleans to an inspection and the payment of an inspection

fee. See *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886). While these scourges of the Nineteenth Century have been largely conquered, the same cannot be said of that great plague of the Twentieth Century—pollution—which now bids fair to imperil mankind's very existence.

Like Louisiana, Georgia is a coastal state. We think that Georgia's interest in protecting its citizens from the ravages of sea-borne pollution today is at least as great as was Louisiana's interest in protecting its citizens from the ravages of sea-borne yellow fever and cholera in 1886. The consequences of pollution in the form of oil spill or similar contaminating discharges upon the State's off-shore waters are not limited simply to the loss of tourists disinclined to bask on beaches befouled by oil or other unappealing substances. Far more important than the risk of damage to the State's beaches (although Georgia's beaches are themselves quite worthy of protection) is the peril to the vast marsh lands and non-navigable waters of the State which as spawning grounds are so vital to aquatic and marine life and the industries dependent upon such life. The effect of pollution damage here might not be limited to the present generation. It could very well bear heavily upon the health and well being of many generations of Georgians who are as yet unborn.

It is scarcely surprising that the interest of Georgia in protecting its beaches, marsh lands and non-navigable waters from pollution emanating from oil spill or similar contaminating discharges upon its coastal waters gives rise to more than a little anxiety over the case at bar. A three-judge district court has held that Florida's "Oil Spill Prevention and Pollution Control Act of 1970",

designed to protect that State's beaches, tidal flats, estuaries, and public lands adjoining the seacoast against oil spill and similar contamination, constitutes an "unlawful intrusion into the exclusive federal admiralty domain". Particularly in light of the fact that this Court has many times in the past noted that torts consummated on land or non-navigable waters are wholly beyond the limits of federal admiralty jurisdiction, the State of Georgia has an obvious interest in knowing not only whether federal admiralty jurisdiction is to be permitted to intrude (or even whether it is constitutionally able to intrude) into areas which in the past were indisputably within the State's jurisdiction, but whether this extension of federal jurisdiction, if it is indeed permissible at all, is to be of such magnitude as to wholly terminate any concurrent right of the State to protect its own property and the health and well being of its citizens from seaborne pollution—particularly where the expressly stated intendment of Congress is that the states are *not* to lose this important right.

QUESTIONS PRESENTED

The ultimate question raised by the district court's decision in this case is whether the vesting of admiralty jurisdiction in the United States under Article III, Section 2, Cl. 1 of the Constitution is to be construed so as to prevent a state from taking legislative action to protect its beaches, marsh lands, coastal properties, nonnavigable waters and the health and well being of its citizens against the ravages of pollution emanating from oil spill and similar contaminating discharges upon its coastal waters.

It is the view of the State of Georgia, however, that

this ultimate question is really enmeshed in and dependent upon the answer to a number of vital questions relating to the constitutional and statutory limits of federal admiralty and maritime jurisdiction. We think these controlling questions, all of which seem to have been given scant attention by the court below, are as follows:

1. Whether the district court's holding that Florida's legislative protection of its beaches, tide lands and public lands adjoining its seacoast from oil spill and similar pollution infringes upon "the exclusive federal admiralty domain", conflicts with Supreme Court decisions that torts consummated on land are outside the scope of federal admiralty jurisdiction?

2. Whether the Admiralty Extension Act (46 U.S.C.A § 740), which attempts to extend admiralty jurisdiction over torts shoreward so as to include injuries caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land", is facially violative of Article III, Section 2, Cl. 1 of the United States Constitution, or, if not, whether the Admiralty Extension Act would be unconstitutional as applied to those particular torts towards which the Florida legislation is primarily directed?

3. Whether state legislation to protect beaches, marsh lands and non-navigable waters from injury due to oil spill and similar contaminating discharges on off-shore waters, if not wholly outside the constitutionally authorized scope of federal admiralty jurisdiction, is nonetheless permitted to the States by the "saving" clause of 28 U.S.C.A. § 1333?

4. Whether a State may exercise its police powers to protect its property and the health and well being of its citizens through legislation affecting maritime matters if such legislation does not "conflict" with federal maritime law?

5. Whether any "conflict" exists between Florida's "Oil Spill Prevention and Pollution Control Act of 1970" and federal maritime law, and if so, whether the conflict is of such nature and scope as would justify the invalidating of Florida's entire Act rather than only those points of actual conflict?

STATEMENT OF THE CASE

The frightful effect upon beaches, marsh lands and non-navigable waters of oil spill and similar contaminating discharges into coastal waters has with good reason invoked legislative responses at various levels of government. On the national level Congress has enacted the "Water Quality Improvement Act of 1970", 84 Stat. 91 (33 U.S.C.A. § 1161), which subjects the owner or operator of a vessel, onshore facility, or offshore facility to a specified degree of liability without fault for those cleanup costs incurred by the federal government, as well as to full liability for cleanup costs where the oil spillage is the result of willful negligence or willful misconduct within the privity and knowledge of the owner. 33 U.S.C.A. § 1161(f). The same section makes these costs a maritime lien on the vessel (Ibid.). The federal act also requires vessels of over 300 tons using navigable waters or any port or place in the United States to show evidence of financial responsibility to meet the liability to the United States to which the vessel could be subjected. 33 U.S.C.A. § 1161(p). The President of the

United States is directed to promulgate regulations establishing procedures for the removal of discharged oil and requirements for equipment to prevent oil discharges from vessels, onshore facilities and offshore facilities. 33 U.S.C.A. § 1161(j). Although the federal act presently deals with oil spills only, it does contemplate future congressional action regarding hazardous substances other than oil—based upon recommendations the President is directed to make to Congress. 33 U.S.C.A. § 1162(a)(g).

It is important to note, however, that the federal legislation speaks solely of suits by the federal government to recover *its* (i.e., the federal government's) cleanup costs, 33 U.S.C.A. § 1161(f), or to compel compliance, 33 U.S.C.A. § 1161(e). Possibly for this reason, or perhaps as an expression of public policy favoring the existence of as many concurrent actions and remedies as possible to fight pollution, the federal legislation clearly contemplates parallel actions by State or local government where pollution injury to fish, shellfish, wildlife, public health and public or private property is threatened. 33 U.S.C.A. § 1161(e). And it expressly disavows any intent of Congress to prevent the States from enacting parallel legislation to protect *their* property as well as the property, health and well being of their citizens. 33 U.S.C.A. § 1161(o) provides:

> "(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section."

Florida[1] accepted the congressional invitation to legislate and enacted its "Oil Spill Prevention and Pollution Control Act of 1970", Chapter 70-244, Laws of Florida; Fla. Stat. Ann. Chapt. 376. The Florida Act parallels the federal legislation by prohibiting the discharge of oil (Florida, however, also prohibiting the discharge of any other pollutant) upon its coastal waters, estuaries, beaches, tidal flats, and lands adjoining the seacoast. Fla. Stat. Ann. § 376.041. Similar to the federal legislation it requires vessels transporting pollutants within State waters to carry such containment gear as may be specified by regulations of the State Department of Natural Resources, Fla. Stat. Ann. § 376.07. And Florida too requires the owner of a vessel to show evidence of financial responsibility (although here the State legislation is broader than the federal in that it applies to all vessels rather than only those exceeding 300 gross tons). Compare Fla. Stat. Ann. § 376.14 with 33 U.S.C.A. § 1161(p). Perhaps the most significant difference be-

[1]Maryland also appears to have enacted oil spill and anti-pollution legislation subsequent to enactment of the federal "Water Quality Improvement Act of 1970". See, Md. Code Ann. Art. 96A § 29 (1971 Cumulative Supplement).

tween the two anti-pollution acts is the greater measure of liability which Florida imposes upon the polluter. While liability without fault to the United States for its cleanup costs is limited to $100 per gross ton of the vessel or $14,000,000 (whichever is lesser), see 33 U.S.C.A. § 1161(f), the Florida Act provides for full liability for *all* cleanup costs and all other damages incurred by the State, as well as for all damages resulting from injury to others. Fla. Stat. Ann. § 376.12.

The case at bar was initiated on March 9, 1971, by a number of merchant shippers and shipping associations. Their complaint, filed in the United States District Court for the Middle District of Florida, Jacksonville Division, contended that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" was unconstitutional among other reasons because it sought to legislate substantive maritime law, which under the Constitution was said to repose exclusively within the federal domain. A three-judge district court was convened and on December 10, 1971, that court held the Florida legislation to be void *in toto* under Article III, Section 2 of the United States Constitution. While noting differences in the treatment of oil spill pollution under the federal "Water Quality Improvement Act of 1970)" and Florida's parallel legislation, the district court in fact did not base its decision upon the theory of a "conflict" between provisions of the two acts. It instead considered existing differences to be evidence that Florida's legislation involved a subject matter beyond its competency to deal with. See, *"Memorandum Opinion and Final Judgment", Appendix to Appellants' Brief,* pp. 4, 15-16. The decision was squarely predicted, in other words, upon the theory that "the Florida Act constitutes unlawful intrusion into the

exclusive federal admiralty domain". Concerning the federal Water Quality Improvement Act's express contemplation of parallel State action in 33 U.S.C.A. § 1161(o), the district court said simply that "Congress is powerless to confer upon the states authority to legislate within the admiralty jurisdiction", and that it would not presume that 33 U.S.C.A. § 1161(o) was an attempt to do so. It "construed" the Congressional intendment of the provision to mean nothing more than that states were free to enforce pollution control measures within their constitutional prerogative. With the greatest respect for the court below we believe that examination of the past decisions of this Court will show not only that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" does *not* constitute an unlawful intrusion into the exclusive federal admiralty domain, but that it is rather the attempted expansion of the scope of the *exclusive* federal admiralty domain, under the district court's decision, which unlawfully intrudes upon Florida's right to protect its own lands and the physical, economic and social well being of its citizens.

THE QUESTIONS ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR THEIR RESOLUTION

1. Whether the district court's holding that Florida's legislative protection of its beaches, tide lands and public lands adjoining its seacoast from oil spill and similar pollution infringes upon "the exclusive federal admiralty domain", conflicts with Supreme Court decisions that torts consummated on land are outside the scope of federal admiralty jurisdiction?

The often catastrophic result of oil spill and similar contaminating discharges from ships and watercraft lies not in their being dropped on navigable waters but in their reaching the shore. It is here, on the beaches, marshes and non-navigable waters of a state that the chief damage is done, and it is to this injury, consummated on land and non-navigable waters, that Florida's "Oil Spill Prevention and Pollution Control Act of 1970" is chiefly directed. The district court nonetheless held that this attempt of a state to protect its own property as well as the health and well being of its citizens was impermissible because the subject matter falls within the *exclusive* federal admiralty jurisdiction.

We respectfully submit that in evaluating this conclusion, the more appropriate starting point is not the question of whether federal admiralty jurisdiction over the subject matter is "exclusive" rather than concurrent with state law jurisdiction, but is the very critical threshold question of whether in light of past Supreme Court decisions federal admiralty jurisdiction can be said to exist at all with respect to oil spill and similar contaminating discharges upon navigable waters where the principal injury complained of and legislated against is one which is consummated on land, marsh lands, or non-navigable waters of the state.

In the absence of any language in the Constitution defining the boundaries of the "admiralty and maritime" jurisdiction vested in the federal government under Article III, Section 2, Cl. 1, it was early concluded that in its constitutional usage this term has reference to the general system, scope and jurisdictional limits of admiralty law as known and understood by lawyers in the United States at the time the Constitution was adopted.

See, e.g., *The Genesee Chief*, 12 How. (53 U.S.) 443, 453 (1851); *The Lottawana*, 21 Wall. (88 U.S.) 558, 574-575 (1874). *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 43-44 (1934). This Court has consistently held that with respect to torts, the question of whether or not an occurrence falls within or without the *constitutional* scope of admiralty jurisdiction depends upon where it took place, or its "locality". E.g., *North Pacific Steamship Company v. Hall Brothers Marine Railway and Shipbuilding Company*, 249 U.S. 119, 125 (1919); *London Guarantee & Accident Company v. Industrial Accident Commission of California*, 279 U.S. 109, 123-24 (1929); *Victory Carriers v. Law*, 404 U.S. ——, 30 L.Ed.2d 383, 387-389 (Dec. 13, 1971). And most important of all with respect to the problem at hand is the fact that this "locality" test itself turns not upon where the forces causing the injury were set in motion but where the injury is consummated. E.g., *The Plymouth*, 3 Wall. (70 U.S.) 20 (1865); *Ex Parte Phenix Insurance Co.*, 118 U.S. 610, 618 (1886); *Johnson v. Chicago and Pacific Elevator Company*, 119 U.S. 388, 397 (1886); *Cleveland Terminal and Valley Railroad Company v. Cleveland Steamship Company*, 208 U.S. 316, 319-20 (1908); *The Troy*, 208 U.S. 321 (1908); *The Panoil*, 266 U.S. 433 (1925).

We think that the same legal principle which caused fire damage to shore structures ignited by sparks from the smokestack of a passing steamer to fall outside admiralty jurisdiction in *Ex Parte Phenix Insurance Co.*, 118 U.S. 610, 618 (1886), applies equally to damage to beaches, marshes and non-navigable waters from oil spill or similar pollutants emitted from a vessel. We think the district court erred in failing to apply the "locality" test

and in consequently failing to hold the Florida legislation to be wholly outside the scope of the admiralty and maritime jurisdiction conferred upon the federal government under Article III, Section 2, Cl. 1 of the Constitution.

2. Whether the Admiralty Extension Act (46 U.S.C.A. § 740), which attempts to extend admiralty jurisdiction over torts shoreward so as to include injuries caused by a vessel on navigable waters "notwithstanding that such damage or injury be done or consummated on land", is facially violative of Article III, Section 2, Cl. 1 of the United States Constitution, or, if not, whether the Admiralty Extension Act would be unconstitutional as applied to those particular torts towards which the Florida legislation is primarily directed?

(a) *Facial Invalidity*

In *Victory Carriers v. Bill Law*, 404 U.S. ____, 30 L.Ed.2d 383 (Dec. 13, 1971), this Court, after discussing its long support of the "locality" test in connection with the limits of admiralty jurisdiction over torts, took note of the fact that the Admiralty Extension Act, 62 Stat. 496, 46 U.S.C.A. § 740, had survived constitutional attack "in the lower federal courts", but gave no indication as to whether or not it agreed with the three lower court decisions to which it referred. It would therefore seem that this Court has tacitly acknowledged that the question remains open.

As we see it, careful analysis of this Court's past decisions leads to the conclusion that any attempt by Congress to extend federal admiralty jurisdiction shoreward so as to gather into its fold those torts which are consummated on land is unconstitutional on its face, with

the three lower court opinions to the contrary being plainly erroneous. To start with, we think the decisions of this Court to which we have already referred, e.g., *The Plymouth* 3 Wall. (70 U.S.) 20 (1865); *Ex Parte Phenix Insurance Co.*, 118 U.S. 610 (1886); *Johnson v. Chicago and Pacific Elevator Company*, 119 U.S. 388 (1886), and *North Pacific Steamship Company v. Hall Brothers Marine Railway and Shipbuilding Company*, 249 U.S. 119, 125 (1919), considered together and in the light of such other decisions as *The Genesee Chief*, 12 How. (53 U.S.) 443, 453 (1851), leave no doubt but that they were dealing with nothing less than the *constitutional limits* of admiralty jurisdiction over torts. Certainly this was the interpretation which this Court placed upon its own prior decisions in *The Blackheath*, 195 U.S. 361, 367 (1904). See also, *The Troy*, 208 U.S. 321, 323 (1908).

Moreover, any possible contention that these decisions were based upon the jurisdiction granted by Congress under the Judiciary Act rather than upon Article III, Section 2, Cl. 1 limitations is demolished by the fact that this Court has flatly stated that the legislative grant (i.e., prior to enactment of the Admiralty Extension Act) was co-extensive with the constitutional grant. See, *Insurance Company v. Dunham*, 11 Wall. (78 U.S.) 1, 23 (1870). Obviously, water cannot be added to the flask which has already been filled.

We respectfully submit that this question of the facial invalidity of the Admiralty Extension Act under Article III, Section 2, Cl. 1 (the Act's validity seemingly being a *sine qua non* of the district court's decision that the Florida legislation was void *in toto* as an "unlawful intrusion into the exclusive federal admiralty domain")

is at the very least an extremely important question which has not yet been passed upon by this Court. Pertinent to the desirability of plenary consideration with briefs on the merits and oral argument, we think, are the words of this Court in *Victory Carriers v. Bill Law*, 404 U.S. ——, 30 L.Ed.2d 383, 391 (Dec. 13, 1971):

> "We are dealing with the intersection of federal and state law. As the law now stands, state law had traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved to state law, would raise difficult questions concerning the extent to which state law would be displaced or preempted. . . . In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts."

(b) *Invalidity as applied*

Even if the Admiralty Extension Act's attempt to extend federal admiralty jurisdiction (so as to include injuries consummated on land) were not unconstitutional on its face, it would not necessarily follow that the Act could constitutionally be applied to those particular wrongs towards which Florida's "Oil Spill Prevention and Pollution Control Act of 1970" is primarily directed (i.e., pollution damage to beaches, tidal flats, nonnavigable waters and lands adjoining the seacoast). The only Court of Appeals decision we are aware of which has upheld the Admiralty Extension Act's constitutionality did so upon the rationale that the particular tort before it (a vessel on navigable waters running into a dike) was indeed within the scope of admiralty jurisdiction as it was understood at the time the Constitution was adopted. See, *United States v. Matson Navigation*

Co., 201 F.2d 610 (9th Cir. 1953). While we think this conclusion is itself quite erroneous because it misreads or misunderstands the *constitutional import* of *The Plymouth, supra; Ex Parte Phenix Insurance Co., supra,* and the various other Supreme Court decisions we have discussed, it is also important to note that the only direct authority which the Court of Appeals was able to muster in support of its conclusion was a statute of Louis XIV of France which defined French admiralty jurisdiction to include quais, dikes, jetties, palisades *and other works erected against the violence of the sea . . . .* ", see 201 F.2d at 615 fn.9. Even assuming the correctness of the Court of Appeals rationale, conclusion and decision, would it not be stretching things more than a little to say that beaches, marshes, non-navigable waters and lands adjoining the seacoast are of the same class of man made objects "erected against the violence of the sea" as were the items placed within admiralty jurisdiction by Louis XIV?

Finally, it might also be pointed out that in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 210 (1963), this Court indicated that for the Admiralty Extension Act to apply to a land consummated tort (the constitutionality of the Act apparently not having been raised in that case) the impact must be felt ashore "at a time and place not remote from the wrongful act". We think that in the case of an oil spill or similar contaminating discharges from a vessel, the impact on shore would almost always be some distance from and some time later than the wrongful act.

In summary, we think that even if the Admiralty Extension Act were not facially violative of Article III, Section 2, Cl. 1 of the Constitution, it would still be an

unconstitutional application to hold that it can expand federal admiralty jurisdiction so as to cover those particular torts towards which the Florida "Oil Spill Prevention and Pollution Control Act of 1970" is chiefly directed.

3. Whether state legislation to protect beaches, marsh lands and non-navigable waters from injury due to oil spill and similar contaminating discharges on its off-shore waters, if not wholly outside the constitutionally authorized scope of federal admiralty jurisdiction, is nonetheless permitted to the States by the "saving" clause of 28 U.S.C.A. § 1333?

While vesting the federal courts with exclusive jurisdiction over admiralty proceedings, 28 U.S.C.A. § 1333 qualifies and limits the scope of this grant by:

> ". . . saving to suitors in all cases all other remedies to which they are entitled."[2]

Construing similar language in the Judiciary Act of 1789, 1 Stat. 73 [i.e., "saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it"], this Court said in *Waring v. Clarke*, 5 How. (46 U.S.) 441, 461 (1847), that the meaning of the "saving" clause was:

> ". . . that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant, when the

[2]While in our discussion of the constitutionality of the Admiralty Extension Act we were referring to the authority of Congress to legislate with respect to torts consummated on land, marshes and non-navigable waters, the "saving" clause also pertains to state jurisdiction respecting incidents or transactions upon navigable territorial waters.

> plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them."

Even under the if anything more restricted language of the "saving" clause as it appeared in the Judiciary Act of 1789, it was recognized that the reference to "common law" remedies did not restrict the states to the then existing common law forms or preclude the creation of new rights under statutory enactments so long as the remedy was of a type recognized at common law, see *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924), including equity. *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900).

The Admiralty Extension Act's legislative history shows that it was not intended to curtail the scope or operation of the "saving" clause, see Senate Report No. 1593, 80th Cong.2d Sess., U.S. Code Cong. Service 1948, pp. 1898, 1899-1900, and the courts have uniformly held that it doesn't. See, e.g., *State Department of Fish and Game v. S S. Bournemouth*, 307 F.Supp. 922, 925 (C.D. Calif. 1969); *Revel v. American Export Lines, Inc.*, 162 F.Supp. 279, 283 (E.D. Va. 1958), *aff'd.* 266 F.2d 82 (4th Cir. 1959). As stated in *Petition of New York Trap Rock Corporation*, 172 F.Supp. 638, 646 (S.D.N.Y. 1959):

> "It [the Admiralty Extension Act] made a new, concurrent remedy in admiralty available for an already existing action at common law."

It consequently seems safe to say that the tort injuries with which the Florida Act is primarily concerned—undisputably beyond the scope of federal admiralty and

maritime jurisdiction and undisputably a proper subject for state legislation prior to enactment of the Admiralty Extension Act—must at least remain within the area of "concurrent" state jurisdiction under the "saving" clause of 28 U.S.C.A. § 1333 after passage of the Admiralty Extension Act. We think that in the case at bar the district court's holding that it was the *exclusive* federal admiralty domain into which the Florida legislation intruded, is erronous, among other reasons, because it wholly overlooks the existence and effect of the "saving" clause. This error is perhaps most clearly demonstrated by the district court's quite misplaced reliance upon *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920). Those cases were concerned with injuries *consummated on navigable waters* rather than on land (the Court also noting in *Jensen* that the state remedy involved, workmen's compensation, was wholly foreign to the common law and hence within the area of *exclusive* federal admiralty jurisdiction because it was beyond the scope of the "saving" clause. 244 U.S., *supra*, at 218). These cases are obviously not apropos to consideration of the validity of Florida's "Oil Spill Prevention and Pollution Control Act of 1970", which deals (a) primarily with injuries which would be consummated on land, and (b) with a remedy which is essentially of a common law nature (e.g., trespass on the case), falling well within the scope of the "saving" clause of 28 U.S.C.A. § 1333. As stated in *Panama Railroad Company v. Vasquez*, 271 U.S. 557, 561 (1926):

> "an action *in personam* to recover damages for tort is one of the most familiar of the common law remedies. . . ."

If federal admiralty jurisdiction exists at all with respect to the injuries and damage towards which the Florida Act is directed, we think the wrongs that Act deals with clearly fall within the area of "concurrent jurisdiction" under the saving clause of 28 U.S.C.A. § 1333 rather than within an area of exclusive federal jurisdiction.

4. Whether a State may exercise its police powers to protect its property and the health and well being of its citizens through legislation affecting maritime matters if such legislation does not "conflict" with federal maritime law?

It has long been held that the grant of admiralty jurisdiction to the federal government under the Constitution and Judiciary Act does not preclude a state from exercising its police powers in its territorial waters in the absence of a conflict with federal maritime law. E.g., *Manchester v. Massachusetts*, 139 U.S. 240, 261 (1891); *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943). In the somewhat related area of "interstate and foreign commerce, this Court long ago upheld the right of Louisiana to protect its citizens from yellow fever and cholera by subjecting all vessels approaching New Orleans to an inspection and the payment of an inspection fee, see, *Morgan's Steamship Company v. Louisiana Board of Health*, 118 U.S. 455 (1886), and more recently, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), it was held that Detroit's Smoke Abatement Code could lawfully be applied to ships docked (on navigable waters) in the Port of Detroit.

The only extent to which federal admiralty jurisdiction limits the state's exercise of its legitimate police

powers to protect its fisheries, wildlife, property and the health of its citizens is that state regulation must not conflict with federal maritime law. See, e.g., *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 125 (1924); *Manchester v. Massachusetts, supra.* As we will show in the following section of this brief, it is unlikely that any conflict exists between federal and state legislation in the present case, but even if certain conflicts were to be established there would still be no basis for invalidating Florida's Act in its entirety—the proper remedy in this situation being to hold simply that in any instance of conflict the federal law prevails.

5. Whether any "conflict" exists between Florida's "Oil Spill Prevention and Pollution Control Act of 1970" and federal maritime law, and if so, whether such conflict is of such nature and scope as would justify the invalidating of Florida's entire Act rather than only those points of actual conflict?

We recognize, of course, that state legislation affecting maritime matters, whether permissible because it is within the scope of the "saving" clause of 28 U.S.C.A. § 1333 or because it is a valid exercise of the legitimate police powers of the state, cannot be permitted to nullify or frustrate federal maritime law or defeat the essential features of federal admiralty jurisdiction. The test of the validity of state legislation in these "concurrent jurisdiction" and permissible "police power" areas is ordinarily that of the existence of *conflict* between state and federal law. See, e.g., *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 125 (1924); *Manchester v. Massachusetts*, 139 U.S. 240, 261 (1891). As stated in *Just v. Chambers*, 312 U.S. 383, 388 (1941):

"With respect to maritime torts we have held that

> the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

At the very start of this brief, we noted that the federal "Water Quality Improvement Act of 1970", 84 Stat. 91 (33 U.S.C.A. § 1161 et seq.), expressly contemplates parallel state action in the fight to prevent pollution injury to fish, wildlife, public health and public or private property as the result of oil spills, 33 U.S.C.A. § 1161(e), and expressly provides that it shall not be construed so as to preempt the right of a state to impose any other requirement or liability with respect to the discharge of oil into any waters within the State, or affect any state or local law not in conflict with the federal Act. We find considerable difficulty in seeing how state legislation such as Florida has enacted can be in conflict with a federal law when it does exactly that which the federal Act authorized it to do. Particularly is this so when it is clear under the cases just cited that "different" is not to be equated with "conflict", and that it is perfectly permissible for a state to add to or supplement the federal law. The court below attributed considerable importance to the fact that the measure of liability to the State and its citizens under the Florida Act is different from the measure of liability to the federal government under the federal Act. We agree that there is a "difference" but deny there is a "conflict". Why should the measure of liability to the state and federal government be the same? Is not the strong public policy of reducing pollution and oil spill damage advanced rather than injured by the existence of supplementary state remedies?

In any event, the existence of conflict on this or any other point can scarcely justify a holding that Florida's Act is unconstitutional in its entirety. We respectfully submit that any problem along this line can more appropriately be handled by conforming Florida's Act to the appropriate federal standards. Thus, in holding the Limitation of Liability Act, 46 U.S.C.A. § 183 et seq. available to limit a ship owner's liability for oil spill in navigable waters under Maryland's oil spill and pollution prevention act, a district court in that state found no difficulty in making the limitation defense available to a defendant without holding Maryland's legislation to be in any way "unconstitutional". See, *In Re Harbor Towing Corporation*, ... F. Supp. ....., 3 Environment Reporter—Cases 1607 (D. Md. No. 70-20-N, decided Nov. 10, 1971); see also, *Richardson v. Harmon*, 222 U.S. 96 (1911) [applying the ship owner's liability limitation statute to a non-maritime tort action brought in the State courts].

CONCLUSION

This case vitally affects the ability of the coastal states to protect their beaches, marsh lands, coastal properties, non-navigable waters, and also the health and well being of their citizens, against the ravages of pollution emanating from oil spill and similar contaminating discharges upon their coastal waters. Drawn into issue are difficult and important questions relating to the constitutional and statutory limitations upon any shoreward march of federal admiralty jurisdiction and equally important issues concerning the extent to which state law is to be preempted or displaced if the march is to be permitted. We think these questions are of the utmost importance and

deserve plenary consideration by this honorable Court with briefs on the merits and oral argument.

Respectfully submitted,

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